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IN THE

Supreme Court of the United States

October Term, 1946

No. 331

J. A. HAGAN, individually, and doing business as EL REY CHEESE CO., JACK AROS and EVERETT HAGAN,

Petitioners,

vs.

PAUL A. PORTER, Administrator, OFFICE OF PRICE ADMINISTRATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH JUDICIAL CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of the Matter Involved.

The petitioners (appellants below) Jack Aros and Everett Hagan, are employees of one J. A. Hagan, doing business as El Rey Cheese Co. J. A. Hagan at all times herein mentioned was engaged in the business of selling

various types of cheeses. The respondent is the Price Administrator, Office of Price Administration.

Upon August 13, 1945, alleged administrative subpoenas *duces tecum,* identical in form, were served upon petitioners Jack Aros and Everett Hagan, requiring each of them to appear and testify on August 16, 1945, before an enforcement attorney of the Office of Price Administration concerning certain sales and purchases of cheese products made by J. A. Hagan, and to produce at the said time and place similarly described records belonging to said J. A. Hagan concerning said purchases and sales.

On the return date, petitioners Jack Aros and Everett Hagan appeared specially by their attorney and moved to quash the issuance and service of the subpoenas on several grounds. Without any ruling thereon, the respondent, under the provisions of Section 202(e) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23; U. S. C. A. Title 50, App., Sec. 901-946), as amended (Pub. L. 108, 79th Cong., 1st Sess.), applied to the United States District Court by petition, with alleged supporting affidavits, for an order compelling obedience to the subpoenas.

Petitioners Jack Aros and Everett Hagan filed affidavits in response to the Court's Order to Show Cause, based on the following grounds:

(1) That none of the testimony sought to be elicited and none of the documents sought to be produced were material or relevant to any investigation the respondent was empowered to make.

(2) That the subpoenas were invalid.

(3) That the subpoenas were unreasonable, uncertain, and indefinite.

(4) That petitioners had not failed to answer and appear at the time and place called for in the subpoenas.

(5) That the subpoenas were not served upon J. A. Hagan, the person licensed and engaged in business, but upon petitioners who were merely employees, and that the documents were neither the property of petitioners or within their custody.

(6) That the subpoenas violate the Fourth and Fifth Amendments to the United States Constitution.

The United States District Court, without permitting said petitioners to make any showing at the time of the hearing on the Order to Show Cause, and on mere uncorroborated, unverified statements of counsel for respondent, issued its Order directing the petitioners to appear before an enforcement attorney of the Office of Price Administration and to testify and produce records in obedience to the subpoenas.

From this Order an appeal was taken by Jack Aros and Everett Hagan to the United States Circuit Court of Appeals for the Ninth Circuit, petitioners specifying eight grounds of error. The specifications with the Circuit Court's rulings are considered together:

(1) The petitioners assigned as error the District Court's failure to require respondent to produce proof of the materiality and relevancy of the information subpoenaed, when such materiality and relevancy was put in question by petitioners. The Circuit Court stated that a mere allegation in the respondent's petition that the testimony sought is material and relevant to his investigation

is all the showing necessary. The Circuit Court stated that the investigation was within the respondent's powers and the subpoenas show on their face the probable materiality of the documents sought.

(2) The petitioners assigned as error the respondent's failure, in his petition or otherwise, to charge any facts sufficient to show that the sales referred to in the subpoenas came within the provisions of any regulation issued by the respondent. The Circuit Court dismissed this assignment with the statement that it would judicially notice the respondent's regulations and that the presumption of regularity which normally attends the acts of administrative officers deprived that omission of compelling significance.

(3) The petitioners assigned as error the refusal of the District Court to permit proof of the invalidity of the subpoenas. The Circuit Court held this specification without merit.

(4) The petitioners assigned as error the fact that by using the abbreviation "etc." in describing the sought-for documents, the subpoenas were rendered unreasonable, uncertain and indefinite. The Circuit Court held that the District Court's Order cured this defect by omitting reference to the "etc."

(5) The petitioners assigned as error the District Court's holding that petitioners failed to answer and appear at the time and place called for in the subpoenas. The Circuit Court held that the District Court had not erred.

(6) The petitioners assigned as error the failure of respondent to serve J. A. Hagan, and the failure of respondent to show that petitioners had custody or control of the records in question. The Circuit Court held that

the uncorroborated, unverified hearsay statement of counsel for respondent made in the District Court was sufficient showing and that if petitioners do not control the records, the time for such showing is when the order of the District Court is disobeyed.

(7) The assignments of error, that the Court's order contravened the Fourth and Fifth Amendments, were dismissed by the Circuit Court with the brief comment that respondent had the authority to make the inquiry, the documents were described in the Order with sufficient definiteness and are relevant; that the books and documents sought by respondent were quasi-public records.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935, Title 28, U. S. C. A. 347.

Judgment was entered by the Circuit Court of Appeals in the within case on June 21, 1946. No application for rehearing has been filed.

Questions Presented by This Petition.

(1) Where an administrative subpoena is invalid for reasons of uncertainty, indefiniteness, and unreasonableness, can such invalidity be cured by the Court's order enforcing compliance with said subpoenas.

(2) Where a respondent puts in issue the materiality and relevancy of the information and documents sought by way of administrative subpoena, must the District Court, before enforcing compliance with such subpoena, require a showing as to the materiality or relevancy of sought-for information and documents.

(3) Where the respondent puts in issue the materiality and relevancy of the information and documents sought

by way of administrative subpoena, is the mere allegation that such information and documents are material and relevant, without more, a sufficient showing upon which the District Court may order compliance with the subpoena.

(4) Where the Administrator fails, either in his petition or otherwise, to show facts sufficient to place the products sold by a merchant within any regulation issued by the Administrator, must the District Court require the Administrator to show the materiality or relevancy of the sought-for information prior to enforcing the subpoenas.

(5) Whether Congress has the authority to compel any person who is not engaged in the business of dealing with any commodity, to appear and testify or to appear and produce documents, or both at any designated place; and if it does possess that authority, can the Congress delegate that authority to the respondent.

(6) Whether the Emergency Price Control Act of 1942, as amended, permits the employees of respondent to require witnesses to testify or to produce documents in connection with an investigation of the type here instituted.

(7) If such investigation is permitted, whether the Act contemplated that the respondent could delegate his authority to make such investigation to a subordinate.

(8) Whether persons served with administrative subpoenas requiring the production of records, which records are not under their control or custody, have the right to make such showing on the hearing of the Order to Show Cause why the subpoenas should not be enforced, or only after such persons are compelled by force of those

facts, to disobey the District Court's Order enforcing the subpoenas.

(9) Where and when persons served with administrative subpoenas have the right to test the validity and authenticity of such subpoenas.

(10) Whether documents which a regulation or statute requires a person engaged in business to keep, have the status of quasi-public records in so far as employees of such person are concerned so as to deprive such employees of the protection of the Fifth Amendment.

Reasons Relied on for the Allowance of the Writ.

It is petitioners' contention that where an administrative subpoena is invalid for any reason, the Court's order enforcing compliance with such subpoena cannot cure the invalidity. Thus, as here, where the subpoena violated the Fourth Amendment, the Court cannot cure that defect. The Court can only enforce valid subpoenas, and such was the Congressional intention. *Emergency Price Control Act of 1942,* as amended, Section 205(e), *supra.* The Circuit Court of Appeals erred in holding that the District Court's Order cured the defective subpoenas.

The Circuit Court's decision on the questions as to the necessary showing as to materiality, relevancy and validity of the subpoenas conflicts with the decisions in other circuits, to wit: *Goodyear Tire and Rubber Company v. National Labor Relations Board,* 122 F. (2d) 450; *Bowles v. Beatrice Creamery Company* (C. C. A. 10th), 146 F. (2d) 774; *United States v. Davis* (C. C. A. 2d), 151 F. (2d) 140, and with the decisions of this Court in the case of *Federal Trade Commission v. American Tobacco Company,* 264 U. S. 298; *Oklahoma Press Pub. Co. v. Walling,* 66 S. Ct. 494.

Petitioners respectfully submit that Congress, itself, does not have the authority to subpoena the petitioners on facts such as are involved in this instance. In any event, if Congress could subpoena the petitioners, its act would be a legislative act and that power cannot be delegated. *Cudahy Packing Co. v. Holland,* 315 U. S. 357; *Interstate Commerce Commission v. Brimson,* 154 U. S. 447, 478, 479, 38 L. Ed. 1047, 1057, 1058; *Harriman v. Interstate Commerce Commission,* 211 U. S. 407, 418, 53 L. Ed. 253, 263.

The Circuit Court's decision, that the proper time to raise the question that petitioners do not have the custody or control of the documents is after disobedience of the Court's order enforcing compliance with the subpoenas, appears to conflict with this Court's decisions in *Cobbledick v. United States,* 309 U. S. 323, 329, 84 L. Ed. 783, 787; *Ellis v. United States,* 237 U. S. 434, 59 L. Ed. 1036; *Harriman v. Interstate Commerce Commission, supra.*

The questions presented in this petition are of great and immediate importance not only to these petitioners, but to all persons subject to the inquisitorial powers of administrative agencies, and their decision is vitally necessary so that their constitutional rights may be safeguarded and further that they may be properly advised as to such rights.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ABRAHAM GOTTFRIED,
Attorney for Petitioners.

Dated: July 8, 1946.

IN THE

Supreme Court of the United States

October Term, 1946.

No.....

J. A. HAGAN, individually, and doing business as EL REY CHEESE CO., JACK AROS and EVERETT HAGAN,

Petitioners,

vs.

PAUL A. PORTER, Administrator, OFFICE OF PRICE ADMINISTRATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

Jurisdiction is conferred by Section 240(a) of the Judicial Code, 28 U. S. C. A. 347.

The judgment of the United States District Court was entered October 29, 1945. [R. 35.]

The opinion of the Circuit Court of Appeals was rendered and filed June 21, 1946. [R. 66; ..... F. (2d) .....]

The judgment of the Circuit Court of Appeals was entered June 21, 1946. [R. 75.]

No petition for rehearing was filed.

Jurisdiction.

The statute relied on is Section 240(a) of the Judicial Code, 28 U. S. C. A. 347.

The District Court's Order enforcing the alleged administrative subpoena in this case, affirmed by the Circuit Court of Appeals, is in conflict with decisions in other Circuits, as well as in conflict with decisions of this Court. The alleged subpoena, the hearing afforded in the District Court, and the Order issued by the District Court enforcing compliance with the alleged subpoena, violated the petitioners' rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States. The petition having been filed within the statutory time, from a final decision by the Circuit Court of Appeals, properly invokes this Court's jurisdiction. 28 U. S. C. A. 347.

Statement of the Case.

While the appeal is entitled "J. A. Hagan, individually, and doing business as El Rey Cheese Company, Jack Aros and Everett Hagan," the appeal in the Court below was, and this petition is prosecuted by Jack Aros and Everett Hagan only as these are the only two parties served with subpoenas and they were the only two parties to whom the District Court's Order was directed.

Petitioners are merely employees of one J. A. Hagan, who is engaged in the manufacture and sale of certain types of cheese and cheese products. The respondent was, at the time of the decision by the Circuit Court of

Appeals, the Price Administrator of the Office of Price Administration. Despite the fact that the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2nd Sess., 56 Stat. 23; U. S. C. A. Title 50, Appendix, Section 901-946), as amended (Pub. L. 108, 79th Cong., 1st Sess.) expired on June 30, 1946 and there may be some question of the continued existence of the respondent as Administrator, nevertheless Section 1(b) of said Act is sufficient to sustain this suit.

On August 13, 1945, alleged administrative subpoenas *duces tecum* were served upon each of the petitioners requiring each of them to appear and testify on August 16, 1945, before an Enforcement Attorney of the Office of Price Administration, concerning certain sales and purchases of cheese products made by J. A. Hagan, and to produce at the said time and place documents and records belonging to said J. A. Hagan concerning said purchases and sales. [R. 11-14, incl.]

On a previous occasion subpoenas *duces tecum,* couched in similar language but signed, not by the Administrator, but by one who purported to be an Acting District Director, had been served upon petitioners. Apparently recognizing the invalidity of these subpoenas the respondent took no steps to enforce said subpoenas, but instead served the subpoenas here in question.

On advice of counsel, and because of the obvious insufficiency and invalidity of the instant subpoenas, petitioners appeared specially on the return date for the purpose

of moving to quash the issuance of said subpoenas. [R. 20.]

Without any ruling on this motion, respondent applied to the United States District Court for an Order enforcing compliance with the subpoenas. [R. 2.] As a result of this petition an Order to Show Cause was issued by the United States District Court, returnable on October 29, 1945. [R. 22.]

Petitioners filed a reply in writing [R. 24] and appeared by counsel. [R. 40.] At this hearing counsel for the Administrator made a number of unsworn, uncorroborated statements with relation to J. A. Hagan and petitioners and to the records in question and, as a result of which the District Court, without permitting any testimony of any kind on the issues raised by petitioners' reply, issued an order directing the petitioners to appear and testify and produce documents and records concerning the sales by the El Rey Cheese Company of certain cheese. [R. 35.]

An appeal was taken by petitioners to the Ninth Circuit Court of Appeals from this Order [R. 37], specifying nine points upon which appellants intended to rely on appeal. [R. 59.] As outlined in the petition for Writ of Certiorari filed herein, the Circuit Court overruled each of the petitioners' specifications and affirmed the decision of the District Court. [R. 66.]

Specification of Errors.

1. Petitioners assigned as error in the Court below the issuance by the District Court of its Order enforcing the subpoenas where the respondent had failed utterly to make any showing, in his Petition to the District Court, of the relevancy or materiality of the evidence or documents sought by the subpoenas; and assigned as further error the District Court's failure to require the respondent to prove the relevancy or materiality of the evidence or documents so sought, when that issue was raised by petitioners' answer to the Order to Show Cause.

The Circuit Court treated these assignments of error as a contention by the petitioners that a showing of "probable cause" was a prerequisite for enforcement of the subpoenas. The Circuit Court held that such a showing was not necessary.

The Circuit Court erred in so misconstruing petitioners' specifications.

2. The Circuit Court erred in holding that the mere allegation of a conclusion by the respondent to the effect that the evidence and documents sought were relevant and material, was a sufficient showing.

3. The Circuit Court erred in holding that the standards of materiality and relevancy are far less rigid in an *ex parte* inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceeding.

4. The Circuit Court erred in holding that the hearing before the District Court was an *ex parte* hearing and not a trial or adversary proceeding.

5. The Circuit Court erred in holding that the inspection here undertaken by the respondent Administrator was well within his powers.

6. The Circuit Court erred in holding that the subpoenas show on their face the probable materiality of the documents sought.

7. The Circuit Court erred in holding that the omission by the respondent to charge facts sufficient to bring petitioners' sales within the provisions of a regulation, was not fatal.

8. The Circuit Court erred in failing to hold that the District Court had erred in refusing to hear evidence concerning the validity of the execution of the subpoenas.

9. The Circuit Court erred in not holding that the subpoenas were unreasonable, uncertain and indefinite, and in holding that the Order of the District Court cured any defects in the subpoenas.

10. The Circuit Court erred in holding that the District Court was clearly justified in finding that appellants had failed and refused to obey the subpoenas.

11. The Circuit Court erred in accepting the uncorroborated, unverified statements of counsel for respondents as to the relationship of J. A. Hagan and the petitioners to the records.

12. The Circuit Court erred in holding that the proper time to decide the issue of whether petitioners had the records in their control is when the order of the District Court is disobeyed.

13. The Circuit Court erred in holding that the Order and subpoenas do not violate the petitioners' rights under the Fourth and Fifth Amendments.

ARGUMENT.

I.

Where an Administrative Subpoena Is Invalid for Reasons of Uncertainty, Indefiniteness and Unreasonableness, Such Invalidity Cannot Be Cured by the Court's Order Enforcing Compliance With Said Subpoenas.

Section 202(e) of the Emergency Price Control Act of 1942, as amended, *supra*, reads as follows:

> "(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4(a)."

Petitioners respectfully submit that the basis of the District Court's action must be a valid subpoena and one not in violation of the Fourth Amendment. *Oklahoma Press Publishing Co. v. Walling,* 66 Sup. Ct. 494.

Even the Circuit Court of Appeals, by inference, admits that the use of the word "etc." at the end of the list of documents named in the subpoenas rendered the subpoenas uncertain, indefiinte, and unreasonable, in view of its refusal to consider this point and its insistence that the Court's order did not contain the word "etc." That

the use of the word "etc." rendered the subpoenas open to the objections named is without question.

Persons subject to a subpoena *duces tecum* should not be required to speculate as to which records were required by the Administrator to justify an order for the inspection of books or papers—the books or papers should be specified with reasonable certainty. 17 *Amer. Jur.* 33; *Bank of America v. Douglass,* 105 F. (2d) 100; *Bowles v. Beatrice Creamery Co.,* 146 F. (2d) 774; *Oklahoma Press Publishing Co. v. Walling, supra.*

If the subpoenas are invalid for any reason, there cannot be any contumacy by, or refusal to obey, such subpoenas. A definition of "lawful process" is set forth in *Bowles v. Beatrice Creamery Co., supra* (p. 779):

> "There are cogent reasons why production and inspection should only be compelled by lawful process. Where the production is in response to lawful process, the owner of the books and papers is afforded protection by the limitations which the law imposes with respect to lawful process. Such process must state the subject of the inquiry, must particularly describe the books and papers so that they can be readily identified, and must limit its requirements to books and papers that are relevant to the inquiry. In other words, such process must confine its requirements within the limits which reason imposes in the circumstances of the particular case. Moreover, the person to whom such process is addressed may challenge its legality before being compelled to respond thereto."

II.

Where a Respondent Put in Issue the Materiality and Relevancy of the Information and Documents Sought by Way of Administrative Subpoena, the District Court Must Require, Before Enforcing Compliance With Such Subpoena, a Showing as to the Materiality or Relevancy of the Sought-for Information and Documents.

The subpoenas and the petition as filed in the District Court failed to show on their face the relevancy or materiality of the testimony or documents required by the subpoenas, other than the Administrator's self-serving conclusion in the petition that such testimony or documents are relevant or material. If the Circuit Court was correct in its views as to the necessity of any showing by the Administrator, no statement of any kind as to the materiality or relevancy would be necessary.

Respondent's language in its petition to the District Court indicates that it was conducting a general search and "fishing expedition." [R. 4-5.] No ground was shown for supposing that the documents called for contained evidence relevant to any inquiry, nor was there any statement, either in the petition or the subpoenas, stating the subject of any inquiry.

In *United States v. Davis* (C. C. A. 2), 151 F. (2d) 140, at p. 143, it is stated:

> "We are very clear that to continue in a business after it has been regulated * * * does not expose a dealer to any general search;"

In the case of *Goodyear Tire and Rubber Company v. National Labor Relations Board,* 122 F. (2d) 450, the Circuit Court of Appeals stated (p. 453):

> "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer * * * We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable."

In the case of *Federal Trade Commission v. American Tobacco Company,* 264 U. S. 298, 305, 306, 44 S. Ct. 336, 337, 68 L. Ed. 696, 32 A. L. R. 786, the Court held as follows (p. 305):

> "Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. * * * It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

The District Court of Tennessee in the case of *Bowles v. Cherokee Textile Mills et al.*, 61 F. Supp. 584, denied an order enforcing an Administrative subpoena, basing its decision on the *Goodyear Tire and Rubber Company* and the *American Tobacco Company* cases (*supra*), even though, as the Court stated, the Emergency Price Control Act uses language broad enough to authorize the Court to compel production of documents, etc., whether of evidential value or not.

Respondent, by way of recital in his petition and as his conclusion, referred to three regulations under which J. A. Hagan was required to keep records. [R. 5.] However, there was no direct allegation in said petition that the sales of the commodities involved, to wit, Swiss Gruyere Type Cheese or Taylor Maid Gruyere Type Swiss Cheese, came under the said regulations or any of them. Unless the said commodities came under said regulations, the records required to be kept thereunder were immaterial and irrelevant and, further, said J. A. Hagan was not required to keep such records.

The subpoenas and petition to the District Court indicate that the Administrator was acting under three different regulations. Each of these regulations, as shown by the extracts in the Appendix attached hereto, require different records to be kept. For example, if the sales are subject to MPR 280, the documents covering purchases of the cheeses described in the subpoenas are immaterial and irrelevant.

A mere recital in respondent's petition to the District Court is insufficient to determine the relevancy of the records required to be produced where respondent does not allege and show that petitioners' sales came within the provisions of some one regulation.

III.

Where the Subpoena or the Petition to Enforce Said Subpoena Does Not Contain a Showing as to the Materiality or Relevancy of Sought-for Information and Documents, Then the District Court Must Require the Administrator to Make Such a Showing Before Ordering Compliance With the Subpoena, in Any Case Where the Respondent Puts in Issue the Materiality and Relevancy of the Information and Documents Sought to Be Obtained by Such Subpoena.

The subpoenas do not contain any evidence as to the materiality and relevancy of the information or documents sought. The petition merely contains a general conclusion of the respondent. [R. 7.] This allegation or conclusion was denied by the petitioners in paragraph 3 of their reply. [R. 25.]

Petitioners also raised the question of the materiality and relevancy of the said documents before the Court. [R. 48.] The District Court, however, refused to hear such evidence, stating that it would issue the Order [R. 46], and that the question of materiality would not be considered until appellants were cited for contempt. [R. 48, 53, 54.] It would appear from the above proceedings that the District Court was of the opinion that the Administrator was the sole judge of the materiality and relevancy of the documents sought to be produced and that the Court had no jurisdiction to review the administrative determination of said materiality or relevancy.

The Circuit Court of Appeals held that a showing of "probable cause" was not a prerequisite to the enforcement of an administrative subpoena issued under the Act. While the Circuit Court cites *Oklahoma Press Publishing Co. v. Walling, supra,* a reading of that decision indicates that this Court held just to the contrary, stating that a showing of probable cause "is satisfied in [the case] of an order for production, by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order and the documents sought are relevant to the inquiry. . . . Necessarily, as has been said, this cannot be reduced to formula, for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."

Issuance of an order consequently is not mandatory on the District Court, but is within the discretion of the District Court, which discretion is to be judicially exercised. *Goodyear Tire and Rubber Company v. National Labor Relations Board, supra; Bowles v. Cherokee Textile Mills, supra; Hale v. Hinckle,* 201 U. S. 43, 77.

In the case of an application to the Court for an order enforcing the subpoena issued by the Administrator, the person to whom the order or subpoena is directed is entitled to have an opportunity to test its validity. 42 *Amer. Jur.* 419; *Goodyear Tire and Rubber Company v. National Labor Relations Board, supra; Bowles v. Beatrice Creamery Company, supra.*

A contention made in an answer to an Order to Show Cause that the documents called for have no relation to the particular matter in question, raises an issue of fact for determination by the Court and before the aid sought by the Administrator will be granted, it must appear from the evidence that the papers, documents or evidence which are sought are material to a determination of the matter under investigation. The burden of proof is on the Administrator to prove the relevancy of the documents sought. *Goodyear Tire and Rubber Company v. National Labor Relations Board, supra; Federal Trade Commission v. American Tobacco Company, supra; Bowles v. Cherokee Textile Mills, supra.*

As may be seen from the quoted portions of Section 202(a) and (c) (see *infra* under Part IV of Argument), the power to use the subpoena is for the purpose of obtaining information:

(1) To assist the Administrator in prescribing a regulation or order under the Act, or

(2) In the Administration of the Act and regulations, orders and price schedules thereunder, or

(3) To enforce the Act and regulations, orders, and price schedules thereunder.

Thus, whether the information sought is material and relevant to the power granted is a matter of fact, which when placed in issue, must be determined by the Court after a showing by the Administrator. The respondent's conclusion that the information is material and relevant cannot foreclose the Court.

IV.

Congress Itself Does Not Have the Authority to Exercise the Power Which Respondent Claims; and Even if Congress Had That Power It Could Not Delegate It to Respondent.

The instant case is "on all fours" with that of *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 53 L. Ed. 263. In that case, the Commission sought to exercise the subpoena power in pursuance to its authority to recommend legislation to Congress. This Court raised the question of the extent of the Congressional power, as well as the delegation of such power, stating (p. 418):

> "Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act."

The power here sought to be exercised is that contained in Section 202 (a) and (c) of the Emergency Price Control Act of 1942, as amended, which reads:

> "Sec. 202.(a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder."

* * * * * * * *

"(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place."

Petitioners respectfully submit that Congress, itself, possesses no constitutional authority to issue a subpoena in such an instance. Moreover, if it did, such power being purely legislative cannot be delegated to respondent.

Moreover, any attempt by Congress to grant to the Administrator this broad power without any limitation as to the mode of exercising it would be clearly contrary to the Constitution. The words in Section 202(a) "to obtain such information as he deems necessary or proper" must necessarily carry with them the limitation that the information requested must be relevant and material to the purposes for which the authority is granted.

V.

The Emergency Price Control Act of 1942 Does Not Authorize the Respondent to Conduct an Investigation of the Type and Character Involved; and if It Does, It Does Not Authorize Respondent to Delegate That Authority to Subordinate Employees.

Section 201(a) and (b) provides in part, as follows:

"Sec. 201.(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the 'Administrator'). * * * The Administrator may, subject to the civil service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and

shall fix their compensation in accordance with the Classification Act of 1923, as amended."

* * * * * * * *

"(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. * * *"

In the instant case, while the subpoenas were allegedly signed by the person purporting to act as the Administrator, the person before whom the subpoenas were returnable, is denominated an enforcement attorney.

In the petition filed in the District Court by the same enforcement attorney, it was alleged that respondent deemed an investigation necessary to determine "if" there was evidence that J. A. Hagan and the Petitioners had complied with the provisions of the Act. [R. 4.] The attorney in the petition concluded, but without alleging any facts, that it was deemed necessary (without specifying by whom) in conducting said investigation to obtain such information from certain records of J. A. Hagan and Petitioners. [R. 4, 5.] However, the petition did not directly or even by implication allege that any violation had been committed by Petitioners, nor did it show how or in what manner the said records were relevant or material to any investigation permitted by law, by resting its demand upon the sole ground that "an" investigation necessary to determine "if" there was evidence.

Upon the hearing of the Order to Show Cause, counsel for respondent volunteered the statement, unsupported by any evidence or proof, or any allegation in the petition, that in the month of May, information had been brought to the Office of Price Administration that Petitioners

"were in violation of 'certain' regulations covering the sale of cheese," without in any manner stating what the violation consisted of or what regulation was violated. [R. 42,43.] This statement, in so far as Petitioners can determine, is the only inkling that appears that any violation by Petitioners if any, was even suspected, and even this statement is so vague and indefinite as not to have conveyed any meaning either to the Court or counsel. It certainly did not seem sufficiently substantial to respondent to make such an allegation in the petition or in the subpoenas.

Petitioners respectfully submit that Congress did not intend to confer upon the respondent a power as broad as was attempted to be exercised in this particular case, which would suggest the most general of "fishing expeditions."

Assuming, without conceding, that such a power was conferred upon the respondent, it seems obvious that Congress did not intend to permit the respondent to delegate that power to any member of the large host of enforcement personnel. *Cudahy Packing Co. v. Holland,* 315 U. S. 357.

A case "on all fours" with the instant one, is that decided by this Court in *Harriman v. Interstate Commerce Commission,* 211 U. S. 407, 53 Law. Ed. 253. In that case, the Interstate Commerce Commission also was attempting to exercise as broad as possible construction of its powers to elicit testimony and evidence by way of subpoenas. In that case, this Court stated (p. 419):

> "We are of the opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation

of the act, and investigations by the Commission upon matters that might have been made the object of the complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.

"We could not believe, on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed."

As we have already stated, even if Congress had given the Administrator the power which he claims in this instance, we respectfully submit that Congress did not intend that he should have the authority to delegate said power. This Court in *Harriman v. Interstate Commerce Commission, supra,* stated, as follows (p. 418):

"Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in Interstate Commerce Commission v. Brimson, 154 U. S. 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act."

VI.

The Time to Make a Showing That the Records Called for by Subpoenas Are Not in Control or Custody of the Persons Upon Whom the Subpoenas Are Served, Is Upon the Return of the Order to Show Cause Why the Subpoenas Should Not Be Enforced and Not After Such Persons Have Violated the Order of the Court and Subjected Themselves to Contempt.

Both the District Court and the Circuit Court's finding that petitioners should disobey the Court's Order and in a contempt proceeding raise the defense that they did not have control or custody of the records in question, is patently erroneous. Where the District Court issues an Order to Show Cause why a subpoena should not be enforced, the hearing on such Order to Show Cause is the most logical time to make such showing.

The Order from which an appeal may be taken is the order issued at the time of the hearing on the return of the Order to Show Cause. An appeal from the Order adjudging petitioners in contempt of the District Court is not appealable. *Cobbledick v. United States,* 309 U. S. 323, 84 L. Ed. 783. In this case the Court stated (pp. 329-330):

> "One class of cases dealing with the duty of witnesses to testify presents differentiating circumstances. These cases have arisen under §12 of the Interstate Commerce Act, whereby a proceeding may be brought in the district court to compel testimony from persons who have refused to make disclosures before the Interstate Commerce Commission. In these cases the orders of the district court directing the witness to answer have been held final and reviewable. Interstate Commerce Comm'n v. Brimson,

154 U. S. 447; Harriman v. Interstate Commerce Comm'n, 211 U. S. 407; Ellis v. Interstate Commerce Comm'n, 237 U. S. 434. Such cases were duly considered in the Alexander Case, and deemed to rest 'on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences.' 201 U. S. at 121. The differences were thought controlling. Appeal from an order under §12 was again here in the Ellis Case, supra, fully argued in the briefs, and again differentiated from a situation like that in the Alexander Case. 'No doubt' was felt that an appeal lay from the district court's direction to testify.

" 'It is the end of a proceeding begun against the witness'—was the pithy expression for this type of case. 237 U. S. at 442, 59 L. ed. 1040, 35 S. Ct. 645. And it is a sufficient justification for treating these controversies differently from those arising out of court proceedings unrelated to any administrative agency. The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy. But a proceeding like that under §12 of the Interstate Commerce Act may be deemed self-contained, so far as the judiciary is concerned—as much so as an independent suit in equity in which appeal will lie from an injunction without the necessity of waiting for disobedience. After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself."

VII.

The Doctrine of Quasi-Public Records Applies Only to the Person Engaged in Business and Not to His Employees.

The Circuit Court's decision that the constitutional privilege against self-incrimination may not be invoked by petitioners who are merely employees of the person engaged in business, is a new and unwarranted extension of the doctrine of *Wilson v. United States,* 221 U. S. 361, and cases that have proceeded along similar lines. What the Circuit Court means by the statement that appellants are protected by Section 202(g) of the Emergency Price Control Act of 1942, as amended, in view of its statement that the Fifth Amendment does not apply to such records is unfathomable as far as petitioners are concerned.

CONCLUSION.

Petitioners respectfully submit that the decision of the Circuit Court of Appeal should be reversed on the grounds that the subpoenas in the instant case were invalid and that their invalidity was not cured by the Order of the District Court; that the District Court abused its discretion in not requiring the respondent to make a *prima facie* showing of the materiality or relevancy of the information and documents sought, and that the District Court abused its discretion in not permitting the petitioners to test the validity and legality of the subpoenas in the hearing on return of the Order to Show Cause.

Respectfully submitted,

ABRAHAM GOTTFRIED,

Attorney for Petitioners.

APPENDIX.

Regulations.

1. MAXIMUM PRICE REGULATION 280. (8 F. R. 5165.)

§1351.812. Records and reports. (a) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall also preserve all information and records required by §1351.807 of Temporary Maximum Price Regulation No. 22, and shall keep for examination by any person during ordinary business hours a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period, together with an appropriate identification of such product and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Maximum Price Regulation No. 280, every person selling a listed food product shall keep and make available for examination by the Office of Price Administration records of the same kind as he has customarily kept relating to the prices which he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, rec-

ords showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.

2. REVISED MAXIMUM PRICE REGULATION 289. (9 F. R. 5140.)

SEC. 5. *Records and reports.* (a) Every sale of a listed dairy product covered by this Revised Maximum Price Regulations 289, except as hereafter provided in this regulation, shall be invoiced by the seller. The original invoice shall be delivered to the buyer and shall state (1) the date of purchase, (2) the names and addresses of the buyers and sellers, (3) the quantity, grade, and type of package of each listed dairy product sold, (4) the price, per unit of sale and in total, and (5) the geographical place for which the price is calculated.

(b) Every buyer of any listed dairy product shall preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, the original, and every seller of any listed dairy product shall similarly preserve a copy, of each invoice required to be furnished by paragraph (a) of this section.

(c) Every person subject to this regulation shall keep such other records and shall submit such reports as the Office of Price Administration may from time to time request in writing, either in addition to or in substitution for records and reports therein required.

3. TEMPORARY MAXIMUM PRICE REGULATION No. 22 (7 F. R. 7914). This regulation, issued October 3, 1942, was superseded by Maximum Price Regulation No. 280 on December 3, 1942.

§1351.807. *Records and reports.* (a) As to all sales not specifically exempted by other sections of this Temporary Maximum Price Regulation No. 22 every person selling a listed food product shall preserve for examination by the Office of Price Administration all his existing records relating to prices which he charged for such listed food product delivered or supplied during the period from September 28, 1942, to October 2, 1942, inclusive, and his offering prices for delivery or supply of a listed food product during such period; and shall prepare, on or before October 24, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing (1) the highest prices charged for such listed food product delivered or supplied during such period and his offering prices for delivery or supply of a listed food product during such period together with an appropriate identification of such product, and (2) all his customary allowances, discounts, and other price differentials.

(b) As to all sales not specifically exempted by other sections of this Temporary Maximum Price Regulation No. 22, every person selling a listed food product shall keep and make available for examination by the Office of Price Administration records of the same kind as he has

customarily kept relating to the prices which he charged for such food product during the period from September 28, 1942, to October 2, 1942, inclusive, and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices.

(c) Such persons shall submit such reports to the Office of Price Administration and keep such other records in addition to or in place of the records required in paragraphs (a) and (b) of this section as the Office of Price Administration may from time to time require.